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6 **Attorneys for Plaintiff Sierra Club**

7  
8 UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
10 OAKLAND DIVISION

11 SIERRA CLUB,

12 Plaintiff,

13 vs.

14 U.S. DEPARTMENT OF  
15 HOMELAND SECURITY  
16 and U.S. CUSTOMS AND BORDER  
PROTECTION,

17 Defendants.

Civil No.

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

1 Plaintiff Sierra Club, through counsel, alleges as follows:

2 **INTRODUCTION**

3 1. Sierra Club brings this case under the Freedom of Information Act to  
4 obtain timely disclosure of agency documents regarding the Trump  
5 Administration's controversial plans to expand or replace the border wall along the  
6 United States-Mexico border.

7 2. On January 25, 2017, President Trump signed an Executive Order,  
8 entitled "Border Security and Immigration Enforcement Improvements," directing  
9 the Secretary of Homeland Security to vastly expand the existing walls along the  
10 roughly 1,900-mile southern border that spans California, Arizona, New Mexico,  
11 and Texas. On February 20, 2017, the Department of Homeland Security  
12 accordingly directed the U.S. Customs and Border Protection to

13 immediately begin planning, design, construction and maintenance of a wall,  
14 including the attendant lighting, technology (including sensors), as well as  
15 patrol and access roads, along the land border with Mexico in accordance  
16 with existing law, in the most appropriate locations and utilizing appropriate  
17 materials and technology to most effectively achieve operational control of  
18 the border.

19 The Department further directed U.S. Customs and Border Protection to  
20 "immediately identify and allocate all sources of available funding" for the  
21 planning, designing, constructing, and maintaining of the border wall.

3. Sierra Club is concerned about and seeks documentation of the  
potential environmental impacts associated with border wall planning, construction

1 and operation. For example, the Secretary of Homeland Security invoked a  
2 statutory waiver to exempt border wall construction during the George W. Bush  
3 administration. The act of waiving federal statutes like the Clean Water Act,  
4 Endangered Species Act, and National Environmental Policy Act put wildlife and  
5 the public health of local communities at risk. Habitat set aside for endangered  
6 species, including the ocelot, jaguar, and Sonoran pronghorn, has been fragmented  
7 and will be damaged even further by building new wall segments.

8       4.     The human cost of new walls would also be immense, dividing border  
9 communities, destroying private land, impeding water flow, harming human  
10 health, and causing unnecessary deaths.

11       5.     The Trump Administration has called for \$1.7 billion in development  
12 funds for 60 miles of new border wall construction in fiscal year 2017, and \$2.8  
13 billion in fiscal year 2018. If built, the new walls would bifurcate the Santa Ana  
14 National Wildlife Refuge in the southern tip of Texas, and harm other sensitive  
15 areas along the border. The Santa Ana National Wildlife Refuge provides habitat  
16 for a diverse of array of rare wildlife species, including the ocelot, an endangered  
17 cat of which there are only about 50 remaining in the United States. Expanded  
18 walls and related infrastructure also threatens to undermine the tourist economy of  
19 the surrounding communities.

20       6.     Sierra Club is the nation's oldest grassroots environmental  
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1 organization, and has long advocated to protect and preserve the cultures of the  
2 borderland communities, as well as the region's land, wildlife, and environment.  
3 As part of this advocacy, and in line with its longstanding interest in government  
4 accountability and transparency, the Sierra Club has filed several requests under  
5 the Freedom of Information Act with U.S. Customs and Border Protection to  
6 obtain documents regarding plans to expand or replace the border wall along the  
7 U.S.-Mexico border. The Sierra Club's Borderlands Grassroots Network Team has  
8 been organizing around border issues for many years, and its advocacy has become  
9 more urgent in light of President Trump's recent activities.

10       7.     The Department of Homeland Security and U.S. Customs and Border  
11 Protection (the Agencies) have violated the Freedom of Information Act by failing  
12 to make a "determination," and failing to produce any documents in response to  
13 Sierra Club's 2016 and 2017 record requests, and a 2013 Sierra Club request that  
14 was remanded back to the Agencies after Sierra Club successfully appealed the  
15 final determination.

16       8.     The Agencies have also violated the Freedom of Information Act by  
17 failing to conduct an adequate search for records and wrongfully withholding  
18 records.

19       9.     Sierra Club brings this lawsuit to hold the Agencies accountable under  
20 the law and respectfully requests that the Court order the Agencies to expeditiously  
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1 produce all non-exempt documents responsive to Sierra Club's records requests.

2 10. Timely disclosure is imperative. The controversial border wall is a  
3 matter of significant public interest and concern; yet, in secret, the Agencies are  
4 actively planning, designing, and preparing for construction and maintenance of  
5 the wall. Given the significant threat the wall poses to communities and the  
6 environment, the public must have timely information about the Trump  
7 Administration's plans, including the potential impacts on communities, lands, and  
8 wildlife.

9 **JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

10 11. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) and 28  
11 U.S.C. § 1331.

12 12. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B)  
13 because Plaintiff Sierra Club has its principal place of business in Oakland,  
14 California.

15 13. For the same reason, intradistrict assignment is proper in the Oakland  
16 Division. *See* N.D. Cal. L.R. 3-2.

17 **PARTIES**

18 14. Plaintiff Sierra Club is incorporated in the State of California as a  
19 nonprofit public benefit corporation with headquarters in Oakland, California. The  
20 Sierra Club is a national organization with 67 chapters and more than 825,000  
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1 members dedicated to exploring, enjoying, and protecting the wild places of the  
2 earth; to practicing and promoting the responsible use of the earth's ecosystems  
3 and resources; to educating and enlisting humanity to protect and restore the  
4 quality of the natural and human environment; and to using all lawful means to  
5 carry out these objectives. Sierra Club is a leading non-governmental organization  
6 seeking to educate and mobilize the public on issues of climate change, habitat  
7 destruction, and the myriad of human and environmental impacts of the Trump  
8 Administration's proposed Border Wall. Sierra Club's Borderlands Grassroots  
9 Network Team has been organizing around border issues for many years. To  
10 support the Borderlands Team's efforts and to further Sierra Club's longstanding  
11 interest in government accountability and transparency, Sierra Club submitted the  
12 records requests at issue in this case.

13       15. Sierra Club brings this action on its own behalf and on behalf of its  
14 members. Sierra Club and its members have been and continue to be injured by the  
15 Agencies' failure to provide requested records on matters of great public interest  
16 and urgency within the timeframes mandated by the Freedom of Information Act.  
17 Absent this critical information, Sierra Club cannot advance its mission to educate  
18 the public about the proposed expansion of the border wall and its impacts on  
19 communities and the environment. The requested relief will redress this injury.

20       16. Defendant U.S. Department of Homeland Security is a department of  
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1 the executive branch of the U.S. government headquartered in Washington, D.C.,  
2 and an agency of the federal government within the meaning of 5 U.S.C.  
3 § 552(f)(1). It has in its possession and control the records sought by Sierra Club,  
4 and as such, is subject to FOIA pursuant to 5 U.S.C. § 552(f).

5 17. Defendant U.S. Customs and Border Protection (CBP) is an agency  
6 within the U.S. Department of Homeland Security and is also headquartered in  
7 Washington, D.C. U.S. Customs and Border Protection has possession, custody,  
8 and control of the records that Sierra Club seeks.

### 9 **STATUTORY FRAMEWORK**

10 18. The Freedom of Information Act (FOIA) requires federal agencies to  
11 promptly release to a public requester, documents and records within the  
12 possession of the agency, unless a statutory exemption applies. 5 U.S.C. § 552(a)–  
13 (b).

14 19. Agencies must make reasonable efforts to search for records in a  
15 manner that is reasonably calculated to locate all records that are responsive to the  
16 FOIA request. *Id.* § 552(a)(3)(C)–(D).

17 20. The agency must make a determination whether to disclose records  
18 within twenty business days of an agency's receipt of a FOIA request. *Id.*  
19 § 552(a)(6)(A)(i).

20 21. If an agency determines that it will comply with the request, it must  
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1 “promptly” release responsive, non-exempt records to the requester. *Id.*

2 § 552(a)(6)(C)(i).

3 22. The Act recognizes that in certain, limited instances, records may be  
4 withheld as exempt from FOIA’s broad disclosure mandate, and thus the Act  
5 identifies nine categories of exemptions. *Id.* § 552(b).

6 23. FOIA places the burden on the agency to prove that it may withhold  
7 responsive records from a requester. *Id.* § 552(a)(4)(B).

8 24. If an agency makes a final determination to withhold or partially  
9 withhold documents, the requester is entitled to appeal the adverse decision to the  
10 agency within a period of time “that is not less than 90 days after the date after  
11 such adverse determination.” *Id.* § (a)(6)(A)(i)(III)(aa).

12 25. An agency must make a determination on any appeal within twenty  
13 business days of receipt. *Id.* § (a)(6)(A)(ii)

14 26. If the agency fails to comply with the statutory time limits to respond  
15 to a FOIA request or appeal, the requester is deemed to have exhausted her  
16 administrative remedies. *Id.* § 552(a)(6)(C)(i).

17 27. District courts have jurisdiction to enjoin an agency from withholding  
18 agency records and “order the production of any agency records improperly  
19 withheld.” *Id.* § 552(a)(4)(B).

20 28. The Freedom of Information Act provides a mechanism for  
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1 disciplinary action against agency officials who have inappropriately withheld  
2 records. Specifically, when requiring the release of improperly withheld records, if  
3 the Court makes a written finding that “the circumstances surrounding the  
4 withholding raise questions whether agency personnel acted arbitrarily or  
5 capriciously,” a disciplinary investigation is triggered. *Id.* § 552(a)(4)(F)(i).

## 6 **FACTS**

### 7 ***Sierra Club’s 2013 FOIA Request for Border Wall Documents and Appeal***

8 29. On April 17, 2013, Sierra Club submitted a FOIA request to U.S.  
9 Customs and Border Protection seeking access to the following records:

10 The Sierra Club requests records dating from January 1, 2010 to the present  
11 pertaining to the construction of border fencing (also commonly referred to  
12 as the border wall, pedestrian fence, and tactical infrastructure) in the  
13 vicinity of the communities of Roma, Rio Grande City, and Los Ebanos,  
14 Texas. These sections of border fencing will be built in the Border Patrol’s  
Rio Grande Valley sector have been designated O-1, O-2, and O-3. Very  
little information has been released to the public regarding these sections of  
border fencing, despite a great deal of local public interest. The Sierra Club  
is particularly interested in the impact of these fencing sections on the Lower  
Rio Grande Valley National Wildlife Refuge and the potential for the  
impedance of flood waters that may accompany the erection of fencing in  
the Rio Grande flood plain.

15 Responsive documents should include (but not be limited to) internal CBP  
16 discussions, memos, meeting notes, presentation materials such as  
Powerpoints and handouts, and reports regarding fencing sections O-1, O-2,  
17 and O-3. Any contracts that have been prepared and/or put out for bid  
and/or granted for these sections should be included. Documents should  
18 also include consultations, interactions, and discussions with the Army  
Corps. of Engineers, the International Boundary Water Commission, US  
Fish and Wildlife, the State Department, and local government officials and  
residents regarding these fencing sections.

19 *See Exhibit A.*

20 30. Customs and Border Protection assigned Sierra Club’s request with  
21 tracking number CBP-2013-016845.

1       31. On September 4, 2015, Customs and Border Protection's FOIA  
2 Division stated that CBP-2013-016845 was currently being processed.

3       32. After repeated requests for updates by Sierra Club, in January 2016,  
4 the FOIA request CBP-2013-016845 disappeared from the online queue at  
5 FOIAonline, a federal website dedicated to processing FOIA requests.

6       33. On January 29, 2016, a new tracking number appeared in Sierra  
7 Club's online queue, CBP-2016-018165, corresponding to the same April 17, 2013  
8 FOIA request.

9       34. On December 9, 2016, Customs and Border Protection determined  
10 that the requested documents were partially releasable, and asserted that FOIA  
11 exemptions (b)(4) and (b)(5) applied to Sierra Club's request.

12       35. Also on December 9, 2016, Customs and Border Protection provided  
13 Sierra Club with 10 documents, but those documents were redacted almost in their  
14 entirety. *See* Exhibit B.

15       36. On February 3, 2017, Sierra Club filed a timely administrative appeal  
16 to Custom and Border Protection's determination on CBP-2013-016845/CBP-  
17 2016-018165. *See* Exhibit C.

18       37. On March 16, 2017, Customs and Border Protection's Chief of the  
19 FOIA Appeals, Policy and Litigation Branch, replied to Sierra Club's February 3,  
20 2017 appeal of the 2013 FOIA request in part with:

1 In this case, the FOIA Division released certain redacted documents to you  
2 but it does not appear as if the FOIA Division searched for a number of other  
3 agency records you identified in your appeal. In this respect, your appeal  
4 specifically identifies various reports, presentations, plans, and other  
documents that were requested in your initial FOIA submission. However,  
as it appears as if the FOIA Division did not search for these records, there is  
an incomplete administrative record for us to review on appeal in this case.

5 Accordingly, we are remanding your request to the FOIA Division for  
6 processing with instructions that the request should be processed within  
7 twenty (20) days from the date of this letter. . . . As mentioned above, you  
may immediately challenge the FOIA Division's failure to respond to your  
request in district court.

8 *See Exhibit D.*

9 38. On April 14, 2017, Customs and Border Protection stated:

10 Please be advised this case has been remanded to the FOIA Division to  
11 complete additional searches for responsive records. An additional 30  
12 business days from the date of this letter are needed for the program office to  
13 complete a comprehensive search of records. Once the searches have been  
completed, you will receive additional correspondence with a projected time  
frame for the completion of the remand.

14 *See Exhibit E.*

15 39. As of the date of this filing, the Agencies have not made any further  
16 determination on Sierra Club's 2013 request or released any additional documents.

17 ***Sierra Club's 2016 FOIA Requests for Border Wall Documents***

18 40. On November 19, 2016, Sierra Club submitted a FOIA request to  
19 Customs and Border Protection seeking access to the following:

20 The Sierra Club trying to understand the scope of work that LMI (the  
21 Logistics Management Institute) did for Customs and Border Protection  
regarding border fencing and related tactical infrastructure. According to

1 LMI's website this work was quite expansive, and LMI and its employees  
 2 repeatedly pop up in FOIA documents that we have received from CBP and  
 3 other agencies. LMI employees appear to have played an important role in  
 the Secure Border Initiative Program Management Office. We have  
 received some SBI PMO meeting minutes from 2007 and 2008 that indicate  
 that meetings were held at LMI's McLean, Virginia office.

4 The Sierra Club specifically seeks documents, including SBI PMO and other  
 5 meeting minutes and notes, as well as emails, memos, and reports, that  
 involve and/or relate to the participation of LMI employees in the Secure  
 Border Initiative Program Management Office, and meetings at LMI's  
 McLean, Virginia office from January 2006 through the present.

6 Please include emails, letters, call logs, and other communications regarding  
 7 these meetings. Customs and Border Protection discussions, reports,  
 updates, presentation materials such as Powerpoints, etc., that pertain to  
 these meetings should be included.

8 *See Exhibit F.*

9 41. Customs and Border Protection assigned the request tracking number  
 10 CBP-2017-011338.

11 42. The Agencies have not made any further determination on Sierra  
 12 Club's 2016 request, CBP-2017-011338, and have not released any documents.

13 ***Sierra Club's 2017 FOIA Request for Border Wall Documents***

14 43. On May 4, 2017, Sierra Club submitted a FOIA request to Customs  
 15 and Border Protection seeking access to the following:

- 16 1. All records related to the Border Wall referred to on p. 32 of the  
 17 Administration's FY 2017 supplemental appropriations request (*see*  
 Exhibit A), including, but not limited to:
  - 18 a. the 14 miles of new Border Wall and 14 miles of replacement  
 Border Wall near San Diego, CA; and
  - 19 b. the 28 miles of levee-Border Wall in the Rio Grande Valley  
 Sector; and
  - 20 c. the 6 miles of new Border Wall proposed in South Texas,  
 hereinafter ("Border Wall Proposals").
- 21 2. All maps and related documents that identify all locations considered or

1 planned for border fencing/tactical infrastructure described in the FY  
2 2017 Appropriations legislation passed in May 2017 (*see* Exhibit B, p.  
69), including but not limited to:

- 3 a. Replacement of primary pedestrian fencing in high priority areas -  
20 miles; and
- 4 b. Replacement of vehicle fencing with primary pedestrian fencing in  
high priority areas - 20 miles; and
- 5 a. Gates for existing barriers- 35 gates.
- 6 3. All bids submitted by vendors to Customs and Border Protection  
("CBP") and/or the Department of Homeland Security ("DHS") related  
7 to the Border Wall Proposals; and
- 8 4. All communications between CBP and/or DHS and vendors related to  
Border Wall Proposals; and
- 9 5. All communications between CBP and DHS related to the Border Wall  
Proposals, including, but not limited to: funding, timetables, and vendor  
10 selection; and
- 11 6. All existing and/or proposed timetables for the execution and  
construction of the Border Wall Proposals; and
- 12 7. All communications between CBP and/or the DHS with the White House  
that relate to the Border Wall Proposals; and
- 13 8. All communication between CBP and/or DHS and any other Federal  
Agencies that relate to the Border Wall Proposals.

14 *See* Exhibit G.

15 44. Customs and Border Protection assigned the request tracking number  
16 CBP-2017-054695.

17 45. On August 11, 2017, three months after Sierra Club's initial request,  
18 Customs and Border Protection sent Sierra Club a letter notifying it that the  
19 average time to process a request related to "travel/border incidents" was a  
minimum of 3 to 6 months.

20 46. On August 29, 2017, the Sierra Club received an email from Customs  
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1 and Border Protection with an attached letter, dated August 30, 2017, stating:

2 [W]e have determined that your request is too broad in scope or did not  
3 specifically identify the records which you are seeking. . . . Whenever  
4 possible, a request should include specific information about each record  
sought, such as the event that would have created the record, a date range for  
the request, and subject matter of the records.

5 The letter directed the Sierra Club to “narrow the scope of your request,” noting  
6 that “a search for records responsive to your request in it’s [sic] present state could  
7 potentially return a massive amount of documents which would create an  
8 reasonable [sic] burden on the agency.” The letter went on asking Sierra Club  
9 to “please provide a time frame for items 4 through 8 of your request.” The letter  
10 concluded with “[t]his is not a denial of your request for records.” *See* Exhibit H.

11 47. The Agencies have not made any further determination on Sierra  
12 Club’s 2017 request, CBP-2017-054695, nor have the Agencies released any  
13 documents.

## 14 15 COUNT I

### 16 Violation of the Freedom of Information Act

#### 17 Failure to Comply with Mandatory Determination Deadline

18 48. Sierra Club re-alleges and incorporates by reference all the foregoing  
19 paragraphs as though fully set forth herein.

20 49. Sierra Club properly requested records within the Agencies’ control.  
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1 determination in violation of the Freedom of Information Act.

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COUNT III

Violation of the Freedom of Information Act

Failure to Comply with Mandatory Determination Deadline

58. Sierra Club re-alleges and incorporates by reference all the foregoing paragraphs as though fully set forth herein.

59. Sierra Club properly requested records within the Agencies' control.

60. Section 552(a)(6)(A)(i) of the Freedom of Information Act requires that an agency make a determination as to a records request within twenty business days after receipt of the request.

61. On March 16, 2017, the U.S. Customs and Border Protection Chief of the FOIA Appeals replied to Sierra Club's February 3, 2017 appeal of the April 17, 2013 FOIA request, and remanded the request back to the FOIA Division with instructions that "the request should be processed within twenty (20) days from the date of this letter."

62. More than twenty business days have passed since the FOIA Appeal Branch remanded the 2013 records request, CBP-2016-018165, back to the Agencies "to complete additional searches for responsive records."

63. The Agencies have failed to provide Sierra Club with a final



1 determination in violation of the Freedom of Information Act.

2 64. Sierra Club has exhausted its administrative remedies with respect to  
3 the processing of its records request.

4  
5 **COUNT IV**

6 **Violation of the Freedom of Information Act**

7 **Failure to Conduct Adequate Search for Records**

8 65. Sierra Club re-alleges and incorporates by reference all the foregoing  
9 paragraphs as though fully set forth herein.

10 66. Sierra Club properly asked for records within the Agencies' control.

11 67. Section 552(a)(3)(C) of the Freedom of Information Act requires that  
12 an agency make reasonable efforts to search for requested records.

13 68. The Agencies' failure to conduct an adequate search for records  
14 responsive to Sierra Club's requests violates the Freedom of Information Act.

15  
16 **COUNT V**

17 **Violation of the Freedom of Information Act**

18 **Wrongful Withholding of Non-Exempt Records**

19 69. Sierra Club re-alleges and incorporates by reference all the foregoing  
20 paragraphs as though fully set forth herein.

21 70. Sierra Club properly asked for records within the Agencies' control.

71. Sierra Club is entitled by law to access to the records requested under the Freedom of Information Act, unless the agency makes an explicit and justified statutory exemption claim.

72. There is no legal basis for the Agencies to assert that any of the nine exemptions to mandatory disclosure apply to withhold records or portions of records from Sierra Club. *See* 5 U.S.C. § 552(b)(1)–(9).

73. The Agencies have violated the Freedom of Information Act by withholding records or portions of records that are responsive to Sierra Club's requests.

## PRAAYER FOR RELIEF

Sierra Club respectfully requests that this Court grant the following relief:

1. Order the Agencies to conduct a search reasonably calculated to uncover all records responsive to Sierra Club's FOIA requests identified in this complaint;

2. Order the Agencies to produce, within twenty days or by such a date as the Court deems appropriate, any and all non-exempt records responsive to Sierra Club's FOIA requests, and indexes justifying the withholding of any responsive records, or portion thereof, withheld under claim of exemption;

3. Enjoin the Agencies from continuing to withhold any and all non-exempt records or portions thereof responsive to Sierra Club's FOIA requests;

5. Award Sierra Club's attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and

6. Grant other relief as the Court deems just and proper.

Respectfully submitted,

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